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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

## No. 315

HENRY J. LAQUE, JR.,

*Petitioner,*

vs.

STATE OF MARYLAND,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

## BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION

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## BRIEF FOR RESPONDENT IN OPPOSITION

### OPINION BELOW

The Opinion of the Court of Appeals of Maryland appears in full in Appendix B of the Petition for Certiorari. Respondent adopts the statement of the Petitioner with respect thereto.

### JURISDICTION

The jurisdictional statement contained in the Petition is accepted by the Respondent.

## QUESTION PRESENTED

Where a zoning ordinance protects pre-existing non-conforming uses and has adequate administrative and judicial safeguards assuring due process to affected landowners, may a collateral attack on final administrative determinations be made a defense in a criminal proceeding brought to enforce such an ordinance?

## ORDINANCE INVOLVED

The pertinent provisions of the Zoning Ordinance of Anne Arundel County (Maryland) are set forth in Appendix A to the Petition, and are set forth verbatim in the Opinion of the Court of Appeals of Maryland, Appendix B, to the Petition.

## STATEMENT

The Zoning Ordinance of Anne Arundel County, Maryland, was first adopted, as respects the area of the County within which the property of the Petitioner is found, on December 2, 1947 (App. this Brief, p. 15). On July 1, 1952, certain amendments to the ordinance were adopted. The amended ordinance, unlike its predecessor, required persons using land for other than agricultural or residential uses (or uses accessory thereto) to obtain a "certificate of occupancy" in order to commence or continue such use *(App. 11-12; 16; App. to Petitioner's Brief in the Court of Appeals of Maryland, 9). When the certificate of occupancy requirements of the ordinance became effective, it was necessary for the Petitioner, who was operating a junk yard in the county within a zoned area, to obtain such a certificate (App. 12). One of the prerequisites to the issuance of such certificate in the case of junk yards

* Unless otherwise noted, References to App. are to Appendix to Petition.

was that the applicant prove a non-conforming use antedating the initial passage date of the ordinance, December 2, 1947, and its non-abandonment for a period of as much as one year thereafter. In the absence of proof of such non-conforming use, a certificate could only issue if the Board granted a "special exception". Petitioner sought such a certificate, basing his claim on a pre-existing non-conforming use, which was denied.

Petitioner than appealed from the adverse action of the Board of Zoning Appeals to the Circuit Court for Anne Arundel County (Record 55-58). The Board of Zoning Appeals and the Circuit Court for Anne Arundel County both found no non-conforming use to exist as to the Petitioner's premises as of December 2, 1947, the date which they considered controlling as the initial passage date of the ordinance. Accordingly, on March 11, 1954, a final order was entered by the Circuit Court for Anne Arundel County, affirming the action of the Board of Zoning Appeals in denying a certificate of occupancy for use of Petitioner's premises as a junk yard. Petitioner did not appeal from that decision to the Court of Appeals of Maryland.

Subsequently, and in the month of August, 1954, five separate warrants were issued for the arrest of the Petitioner, charging that on each of five different dates during the year 1954, and prior to August 2, 1954 the Petitioner unlawfully operated a junk or salvage yard without approval by the Zoning Board. At trial, Petitioner challenged the constitutionality of the ordinance by a Motion to Dismiss, arguing that he should be permitted to relitigate the question of the existence or non-existence of a non-conforming use on the premises *as of July 1, 1952*. Petitioner contended that he had operated a junk yard continuously from 1946 to the date of trial, October 13, 1954, and that he should be

permitted to offer proof of these alleged facts in defense against the criminal charges.

Petitioner also contended that the "special exception" provisions of the ordinance were vague and indefinite and violative of constitutional rights because they permitted the Board of Zoning Appeals to consider, *inter alia*, the "general welfare" in determining whether or not a particular special exception was allowable for a junk or salvage yard. It was against this provision of the ordinance that the Petitioner directed his chief attack on constitutional grounds.

Petitioner was convicted on all charges by the trial court, appealed to the Court of Appeals of Maryland, and again contended that the application of the ordinance in the instant case worked a deprivation of constitutionally guaranteed rights. The Court of Appeals of Maryland affirmed the judgment (Appendix B of Petition, page 21).

## ARGUMENT

This case presents so narrow and limited an issue for consideration that it is obvious that review on certiorari by this Court is neither necessary, desirable nor warranted. The Petitioner does not generally attack the validity of the comprehensive zoning ordinance enacted by Anne Arundel County. He indulges in a minor quibble as to the effective date of the non-conforming use provision of a county zoning ordinance, and seeks to bolster his case by arguing that one sub-division of a particular special exception provision (which he does not claim has been applied in this case) is too vague and general to allow constitutional validity to the ordinance under attack.

The Petitioner seeks to conceal the limited significance of the points raised by him in the Petition by phrasing the questions broadly. Petitioner would have this Court be-

lieve, from the form of the questions posed, that the case presents for consideration an ordinance which disregards vested rights arising out of antecedent non-conforming uses. Such is not the case. He would further have this Court believe that he is deprived of some substantial right because he chose not to avail himself of the ample and adequate provisions for judicial review of administrative findings provided under the laws of Maryland. The purport of his argument is that an unlimited right to relitigate a minor factual issue properly decided by an administrative body must be granted in order to afford the due process contemplated by the Constitution. Procedural due process is amply protected under Maryland law in zoning cases and there is no sound basis for the contention of the Petitioner.

Examination of the arguments made in support of the alleged questions reveals, however, how narrow and lacking in merit or substance are the issues presented for this Court's consideration. The decision of the Court of Appeals of Maryland is so clearly correct, and the protection afforded to the Petitioner's rights so broad in Maryland, that no question warranting decision by this Court is presented.

## I.

## The Decision Below Is Clearly Correct

The Petitioner does not, and indeed cannot, argue that the broad and comprehensive zoning ordinance of Anne Arundel County is not within the police power of the State. Any argument directed to that proposition is fully answered by the Opinion of this Court in *Euclid (Ohio) v. Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 A. L. R. 1016. Since that decision, comprehensive zoning has been accepted and recognized as a valid exercise of the police power. This decision has been followed and accepted in Maryland. *R. B. Construction Co. v. Jackson*, 152 Md.

671, 137 Atl. 278; *Ellicott v. Baltimore*, 180 Md. 176, 181, 23 A. 2d 649, 651; *Anne Arundel County v. Ward*, 186 Md. 330, 46 A. 2d 684, 165 A. L. R. 816.

It follows then, that the Petitioner seeks to make his attack on the ordinance appear to question the basic validity thereof, only as to a device to bring before this Court the very limited question of whether constant relitigation of factual issues decided by an administrative body is a prerequisite to constitutional due process.

That the basic structure of the ordinance is not under attack is readily apparent. The Petitioner does not allege that Anne Arundel County was without power to require that persons occupying land in the county for particular purposes seek and obtain a certificate of occupancy from an administrative body designated by the ordinance. Indeed, he undertook to obtain such a certificate of occupancy, and it is the factual finding of the Board in that proceeding of which he complains. The application of the Petitioner for a certificate immediately brought to issue the question of the antecedent existence of a non-conforming use on the premises in question, since Petitioner did not claim he had a "special exception".

Petitioner, in the instant proceeding, attempted to argue that the controlling date to determine the existence of non-conforming use was July 1, 1952, the date upon which the amendment requiring certificates of occupancy became effective. He sought to deny that the original date of enactment of the ordinance controlled the question of existence or non-existence of a non-conforming use. The administrative body in its hearing decided both issues against the Petitioner. They found December 2, 1947, to be the controlling date in inquiries concerning non-conforming uses. They further found that the Petitioner had not proven such non-conforming use extant on the controlling date. This

determination was appealed by the Petitioner to the Circuit Court for Anne Arundel County, which affirmed the Board on March 11, 1954. This appeal was taken pursuant to the provisions of Section 614 of the Code of Public Local Laws of Anne Arundel County (Flack's 1947 Edition), which provides, in part, as follows:

> "614. Appeals from any resolution of the Board of Zoning Appeals may be made to the Circuit Court of Anne Arundel County by any person, official or board, severally or individually aggrieved by a decision of the said Board of Zoning Appeals, by means of a duly verified petition specifying the illegality of the decision appealed from, which petition must be presented to the said Circuit Court within thirty (30) days of the date of filing of the resolution appealed from".

In the event the Petitioner was dissatisfied with the determination in that proceeding, the law of Maryland fully supports his right to a further review by the Court of Appeals of Maryland. *Kahl v. Cons. Gas Elec. Light & Power Co.*, 191 Md. 249, 60 A. 2d 754; *Francis v. MacGill*, 196 Md. 77, 75 A. 2d 91; *Kracke v. Weinberg*, 197 Md. 339, 79 A. 2d 387. Petitioner did not see fit to avail himself of this remedy.

Every opportunity was thus accorded to the Petitioner to fully litigate his rights, including his constitutional rights, in the proceeding before the zoning board, upon appeal to the Circuit Court of Anne Arundel County and, if he pleased, upon further appeal to the Court of Appeals of Maryland. He had full and unlimited opportunity to litigate the question of the existence or non-existence of a non-conforming use through the judicial system of Maryland. If, in fact, the decision worked a deprivation of property right in violation of constitutional guarantees, the Petitioner might, in that proceeding, have even sought the attention and consideration of this Court by way of certiorari.

The case is not now in that status, however, and the issue here presented is not so broad. The Petitioner permitted that decision with respect to non-conforming use, including the decision as to the applicable date for establishing non-conforming use, to become final. He did not, in fact, obtain the certificate of occupancy required by the ordinance. After that decision became final, he was, therefore, unlawfully operating a junk yard in violation of the ordinance.

Procedural due process is abundantly assured by the provisions of Maryland law where any person affected by the Anne Arundel zoning ordinance contends for the existence, prior to the applicable date of the ordinance, of a non-conforming use. Procedural due process obviously does not contemplate the unlimited right to constantly relitigate issues theretofore decided lawfully and properly. *Yakus v. United States*, 321 U. S. 414, 88 L. Ed. 834, 64 S. Ct. 660; *Bradley v. Richmond*, 227 U. S. 477, 57 L. Ed. 603, 33 S. Ct. 318. As this Court pointed out in the *Yakus* case (321 U. S. 414), at page 444:

> "There is no constitutional requirement that that test (of constitutional validity) be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here."

The county and State authorities can do no more than afford full and fair opportunity to a person affected by a zoning ordinance to obtain a certificate of occupancy. That opportunity was clearly here afforded to the Petitioner. Protection against arbitrary, improper or erroneous action by the administrative body charged with the duty of considering the matter was afforded by complete judicial review available under Maryland law. Having thus satisfied the requirements of procedural due process, no valid argu-

ment can be made that an action by the court in an enforcement proceeding, giving proper finality to such a determination, operates to work a deprivation of constitutional right.

Coming for a moment to the immediate contention made by the Petitioner, to wit, that he should be privileged in a criminal proceeding to relitigate the question of the correctness of the administrative decision affirmed on appeal, two particular legal principles answer the argument. Those principles are as follows:

1. An administrative body acts in a quasi-judicial capacity and determinations made within its jurisdiction are not subject to collateral attack.

*Heath v. Mayor & City Council*, 187 Md. 296, 303, 49 A. 2d 799;
*State v. Roberson*, 198 N. C. 70, 150 S. E. 674;
*People v. Calvar Corp.*, 286 N. Y. 419, 36 N. E. 2d 644, 136 A. L. R. 1276;
*Commonwealth v. DeBaldo*, 169 Pa. Sup. 363, 82 A. 2d 578;
*Washington v. City of Dallas* (Texas, 1942), 159 S. W. 2d 579;
58 *Am. Jur., Zoning*, Sec. 230, p. 1062;
62 *C. J. S. Mun. Corps.*, Sec. 228 (2), p. 564.

2. Where a statutory remedy is provided to review the actions of an administrative body, no collateral attack upon such determinations may be made unless the administrative remedies available have been exhausted. *Kahl v. Cons. Gas Elec. Light & Power Co.*, 191 Md. 249, 60 A. 2d 754; *Applestein v. Baltimore*, 156 Md. 40, 143 Atl. 666; *Anne Arundel County v. Snyder*, 186 Md. 342, 46 A. 2d 689.

Constitutionally, these two rules can have validity only if full, fair and adequate opportunity is afforded to seek judicial review of the actions of the administrator. Only thus can due process be accorded to persons affected by

zoning ordinances and, at the same time, orderly enforcement of the valid zoning law be maintained. Petitioner here does not contend that the administrative procedure and judicial review afforded by the laws of Maryland are inadequate. He, therefore, had a readily available and proper means by which to test the validity of the acts of the administrative body, and to raise and be heard as to every contention here advanced. This gives essential fairness to the salutary rule giving finality to administrative determinations, under adequate judicial supervision, and protecting such valid actions against collateral attack.

An examination of the Petition filed herein, and particularly the Argument section thereof, reveals the interesting fact that Petitioner does *not once* allude to or attempt to answer the reasoning of the Court of Appeals of Maryland, based on the legal principles hereinbefore set forth. It seems odd indeed that Petitioner should seek to have this Court review a matter on certiorari without at least citing and purporting to answer the reasoning of the court whose decision is drawn in question. The natural conclusion to be derived from the Petitioner's approach is that he has no answer, and we believe such is the case.

Petitioner attempted to argue before the Maryland Court of Appeals, and again urges in the Petition, that the ordinance was too vague and indefinite to be enforceable. This argument was founded on that portion of the "special exception" provisions of the ordinance which is set out in full at pages 14 and 15 of Appendix B to the Petition. The argument is novel for the reason that the Petitioner has never contended in this proceeding that he had a special exception, or that the Board of Zoning Appeals acted improperly in denying him a special exception. His argument to this Court is that a minor clause in a sub-paragraph

of a major paragraph of a section of the ordinance invalidates the whole ordinance. How infinitely small and unimportant a provision Petitioner attacks is evidenced by the fact that the phrase drawn in question is contained in Section IV-C-1-(d)-(3) of the ordinance. It is, in fact, but a *minor* element of a *minor* provision of a *minor* area of *one* type of special exception. The other two companion elements of the same clause the Petitioner apparently concedes to be valid and are not attacked by him.

The argument is made despite the presence in the ordinance of a severability clause, which protects the ordinance against invalidity even if some such minor provisions should be invalid, and despite the further fact that Petitioner does not contend he fell within the exception and was denied such exception upon the allegedly invalid ground. This contention answers itself. It is of little consequence and has no applicability in this case.

Petitioner also argues that the admission in evidence of the adverse rulings made in the course of the administrative hearing was unfair and prejudicial. The Court of Appeals of Maryland was clearly correct when it ruled that the resolution of the Board and the order of the Court affirming the same, were admissible to negative defense that petitioner had a "certificate of occupancy" establishing a non-conforming use. The correctness of this ruling is so clear as to require no comment. It should also be noted that at trial, Petitioner's counsel did not consider the admission of the orders and record prejudicial, but based his objection on the ground of materiality.

It was obviously proper, in order to give effect to the rule of law which forbids collateral attack upon administrative determinations, to demonstrate in court that there was an existing final determination by the administrative

body, reviewed by the court. It was further proper to demonstrate that this determination by the administrative body had been affirmed judicially. *Baltimore v. Linthicum,* 170 Md. 245, 183 Atl. 531; *Zoning Appeals v. McKinney,* 174 Md. 551, 199 Atl. 540.

II.

**The Court of Appeals of Maryland Did Not Decide a Federal Question of Substance "In a Way Probably Not In Accord" With the Applicable Rule as Laid Down by This Court.**

Petitioner relies on *Dobbins v. City of Los Angeles,* 195 U. S. 223, 239; 25 S. Ct. 18; 49 L. Ed. 169, to establish the proposition that non-conforming use is a vested right entitled to constitutional protection. The Court of Appeals of Maryland has recognized this proposition in the past. *Amereihn v. Kotras,* 194 Md. 591, 71 A. 2d 865; *Higgins v. City of Baltimore,* 206 Md. 89, 110 A. 2d 503 and did so in this case (App. 18). The ordinance also recognizes this rule. Lawful non-conforming uses are protected. What is here involved is a controversy over the right to relitigate questions once decided by administrative bodies under procedures which accord full protection to the rights of the affected citizen. There is no doubt that non-conforming uses are protected. Maryland's Court of Appeals has in no way denied the validity of the accepted proposition that a non-conforming use is entitled to constitutional protection. The ordinance was not given retroactive application, because, as the Court of Appeals pointed out in its opinion, lawful, non-conforming uses are protected. If the Petitioner seriously contended that a finding that no non-conforming use existed on the applicable date was wrong, either by virtue of a misconception by the zoning authorities and the Circuit Court of Anne Arundel County as to

the applicable date, or by virtue of a misconception of any other factual or legal point by the zoning authorities, such as to cause the decision to operate in a manner depriving him of constitutional rights, he had every opportunity to litigate the point before the Board, on appeal through the Maryland Court of Appeals, and even to this Court. Here, the very narrow issue is the right to relitigate this issue and attack a valid determination in a collateral proceeding.

We submit that there has been no showing that the Court of Appeals of Maryland acted improperly or that the Petitioner has in any way been unfairly treated in the application of the zoning ordinance under the facts of the instant case. He has been accorded every right and prerogative guaranteed him by the constitution and laws of the United States and the State of Maryland.

## III.

## There Is No Question Warranting This Court's Attention.

From what has been said heretofore, it is apparent that the Petitioner would have this Court believe there exists some substantial question as to the validity of the zoning ordinance of Anne Arundel County. We respectfully submit that examination of his arguments and the position which he takes indicate that there is no question of significance as respects zoning generally; no question of significance as respects the zoning ordinance of Anne Arundel County; and, indeed, the decision below is so clearly correct, that there is even no substantial question on the instant case.

## CONCLUSION

For the reasons heretofore assigned, the Petition heretofore filed with this Court for the issuance of a writ of certiorari should be denied.

Respectfully submitted,

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## APPENDIX

LUCY LOSKOSKY, a witness of lawful age, being first duly sworn, deposes and says:

(Mr. Johnson):

1. Will you state your name, please? A. Lucy F. Loskosky.

2. And what is your employment? A. I'm Clerk of the Board of County Commissioners.

3. You received a subpoena to bring with you copies of the Board's Resolutions pertaining to zoning for the Fifth District 1947? A. Yes sir.

4. Do you have that record with you? A. Yes sir.

5. Are they the original minutes of the Board of County Commissioners? A. This is the original minutes of the Board of County Commissioners.

6. Would you read the resolution, please? A. This is taken from the Board proceedings of December the 2nd, 1947. It says here, zoning commissioners suggested that the Board enact resolutions presented at the zoning hearing for the Fifth District at the last meeting. It was moved and seconded by Commissioners Shipley and Leatherbury that in accordance with the provisions of Chapter 388 of the Acts of the General Assembly of Maryland, 1947, it is hereby Ordered and Resolved by the County Commissioners of Anne Arundel County, Maryland, the 2nd day of December, 1947 that the General Anne Arundel County Zoning Ordinance, be amended to the extent of including theatres and other buildings for public entertainment among uses permitted in a light commercial zone, and, further that this, the General Anne Arundel County Zoning Ordinance, together with the Fifth District Zoning Map, signed and dated this day is hereby declared to be in effect in the Fifth District of Anne Arundel County replacing and repealing all zoning ordinances hitherto enacted within the boundaries of said District. Motion was unanimously carried. * * *.